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CHARLES ELMORE

No. 531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

JOHN BOSEMAN, *Petitioner*
(Appellee below)

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Respondent
(Appellant below)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

STERLING D. BENNETT,
Counsel for Petitioner.

LEON P. HOWELL,
Of Counsel.

SUBJECT INDEX

	Pages
PETITION FOR WRIT OF CERTIORARI	1-6
Summary Statement of the Matter Involved	1-3
Reasons Relied on for the Allowance of the Writ	3-6
Prayer for Writ	6-7
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	8-24
Opinion of the Court Below	8
Jurisdiction	8-9
Statement of the Case	9-13
Specification of Errors	13-14
Argument	14-24
CONCLUSION	24
APPENDIX	25-26

TABLE OF CASES CITED

Bradford Electric Light Co. v. Clapper, 284 U. S. 221, 52 S. Ct. 118, 76 L. Ed. 254	9
Camden Fire Ins. Co. v. Wandell, 195 S. W. 289	21
Carruth v. Aetna Life Ins. Co., 122 S. E. 228	16
Chrysler Sales Corp. v. Smith, 9 Fed. (2d) 666	3, 16, 17, 18, 22, 24
Chrysler Sales Corp. v. Spencer, 9 Fed. (2d) 674	3
Connecticut General Life Insurance Company v. Dent, 84 S. W. (2d) 250	16, 18, 19, 21
Connecticut General Life Insurance Company v. Lockwood, 84 S. W. (2d) 245	16, 18, 19, 21
Connecticut General Life Insurance Company v. Moore, 75 S. W. (2d) 329	15, 18, 20
Forsyth v. City of Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095	9
Illinois Bankers Life Association v. Tailey, 68 Fed. (2d) 4	23
Lamborn v. National Bank of Commerce of Norfolk, Va., 276 U. S. 469, 48 S. Ct. 378, 72 L. Ed. 657	9
Lumbermen's Ins. Co. v. Meyer, 179 U. S. 407, 25 S. Ct. 483, 49 L. Ed. 810	23
Metropolitan Life Ins. Co. v. Brownell, 68 Fed. (2d) 481	23
Metropolitan Life Ins. Co. v. Wann, 81 S. W. (2d) 298	16, 18
Metropolitan Life Ins. Co. v. Worton, 70 S. W. (2d) 216	16, 18, 21
Mutual Life Ins. Co. v. Johnson, 55 S. Ct. 154	23
Palmetto Fire Ins. Co. v. Conn, 9 Fed. (2d) 203	3
Palmetto Fire Ins. Co. v. Conn, 272 U. S. 295, 47 S. Ct. 88	3, 21
Pool v. Perkins, 101 S. E. 240	23
Southern Ins. Co. of New Orleans v. Wolverton Hardware Co., 19 S. W. 615	21

INDEX OF STATUTES

Act of Congress, as Amended February 13, 1925, Ch. 229, Sec. 43, S. at L. 938, U. S. C. Title 28, Sec. 347	9
Article 4736 Revised Civil Statutes of Texas	2, 9, 25
Article 5054 Revised Civil Statutes of Texas	14, 21, 24, 25
Article 5056 Revised Civil Statutes of Texas	13, 14, 19, 20, 21, 22, 24, 25
Article 5546 Revised Civil Statutes of Texas	26

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHAS. EVANS HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Summary Statement of the Matter Involved

Your Petitioner respectfully shows:

This is an action at law, tried in the United States District Court in and for the Eastern District of Texas, wherein Petitioner sought from Respondent the total and permanent disability benefits under Group Policy G5039-R issued by the

Connecticut General Life Insurance Company on April 1, 1932, to certain employees of the Gulf Oil Corporation of Pennsylvania and/or subsidiary and/or affiliated companies. In addition to the principal amount of disability benefits the plaintiff recovered One Thousand ($1,000.00) Dollars attorney's fees and twelve (12%) per cent penalty, as provided for in Article 4736 of the Revised Civil Statutes of Texas (said Article hereinafter set out in full).

Petitioner, John Boseman, was an employee of the Gulf Refining Company, a Texas corporation, at Port Arthur, Texas, from July 24, 1916, to October 8, 1932 (R. p. 101).

The master policy provides that no claim for permanent total disability incurred by any employee during his period of employment shall be paid after the termination of such employment unless such employee gives written notice of such disability to the insurance company during the period of employment or within sixty days thereafter (R. pp. 32-33). This is the provision of the policy controlling Petitioner's right to recover. It was admitted that Petitioner did not give notice of his permanent total disability within sixty days after the termination of his employment. It is conceded by the parties: that such provision under the law of Pennsylvania was valid, while the law of Texas makes a notice provision of less than ninety days unreasonable and void (Article 5546 R. C. S. of Texas). (R. p. 243.)

On December 26, 1935, the trial court entered its judgment holding that the final acts necessary to consummate the contract and give it life were performed in Texas, and that such policy was governed by the laws of the State of Texas (R. p. 47), from which appeal was perfected to the Fifth Circuit Court of Appeals, which court reversed the case, holding that every act necessary to consummate the contract of insurance was performed within the Commonwealth of Pennsylvania and should be interpreted under the laws of that Common-

wealth, by an opinion of that court dated July 14, 1936 (R. p. 235). On August 4, 1936, Petitioner filed a petition for rehearing, challenging such conclusion and denying the applicability to the case at bar of the general proposition enunciated by the authorities on which the opinion purported to rely. This was overruled by order dated August 27, 1936.

Reasons Relied on for the Allowance of the Writ

The decision rendered by the Honorable Fifth Circuit Court of Appeals disposes of an important question of general law in a way probably untenable or in conflict with the weight of authorities, in that it construes the contract sued upon to be a Pennsylvania contract, giving an interpretation to the contract beyond the obvious intent of the parties thereto and reversing the meaning heretofore accepted with seeming uniformity by both Federal and State courts.

The decision rendered by the Fifth Circuit Court of Appeals in this case has decided an important question of local law in a way probably in conflict with applicable local decisions, in that it construes Texas statutes, to support the basis of its judgment, in a manner that broadens the meaning of the statutes beyond the obvious legislative intent, and reverses the meaning heretofore accepted with seeming uniformity by Texas courts.

The decision rendered by the Fifth Circuit Court of Appeals in this case is in conflict with the decisions of another Circuit Court of Appeals and the Supreme Court of the United States, on the same matter, to-wit: CHRYSLER SALES CORPORATION v. SMITH, 9 Fed. (2d) 666; PALMETTO FIRE INSURANCE COMPANY v. CONN, 9 Fed. (2d) 203; CHRYSLER SALES CORPORATION v. SPENCER, 9 Fed. (2d) 674; which cases were decided by statutory three-judge Federal courts, and affirmed by this Honorable Court in PALMETTO FIRE INSURANCE COMPANY v. CONN, 272 U. S. 295, 47 S. Ct. 88.

Chrysler Sales Corporation v. Smith, supra; Palmetto Fire Insurance Company v. Conn, supra, and Chrysler Sales Corporation v. Spencer, supra:

FACTS

Effective date of insurance was postponed until the car was sold at retail and title passed.

DECISION OF THE COURT

"The contract involved was not insurance in praesenti but a contract to insure in the future."

FACTS

The contract was not intended to indemnify Chrysler nor its distributors.

The distributor in Wisconsin, acting for the insurance company, performed these acts:

(1) He sells the car, including the insurance.

(2) He collects the price, including the premium. (That he does not remit it is of small account, having already advanced it, receiving nothing for it.)

(3) He fixes the term of the insurance.

(4) He selects the beneficiary (purchaser).

Boseman case:

FACTS

Effective date of insurance was postponed until the employee became eligible and elected to become insured (R. pp. 67-87).

DECISION OF THE COURT

"Boseman's insurance waited only on the issuance of the Master Policy and became effective instantly after and because of that act" (R. p. 240).

FACTS

The master policy G5039-R was not intended to indemnify the Gulf Oil Corporation of Pennsylvania nor its subsidiary and/or affiliated companies.

The Gulf Refining Company, acting for the insurance company, performed the following acts in Texas:

(1) Secured a release from any and all claims and liabilities under Policy G-5545 (R. p. 99).

(2) Secured an application for insurance under Contract G5039-R (R. p. 99).

(3) Required Boseman to execute a pay roll deduction

(5) He notifies Chrysler Sales Corporation of those details by mail.

The master contract provided that the insurer shall issue certificates to purchasers substantially in the form attached.

All premiums were paid on the master contract by the Chrysler Sales Corporation to the insurance company at Baltimore, Md.

order to the employer for the purpose of collecting the individual empolyee's premiums on Policy G5039-R (R. pp. 73-79).

(4) Collected John Boseman's premiums on Policy G5039-R in Texas (R. p. 99).

(5) Notified the Gulf Oil Corporation of Pennsylvania of these details by mail.

(6) Delivered Boseman a certificate under master policy G5039-R in Texas (R. pp. 90-91).

(7) Fixed the term of insurance (having the right to discharge the employee, thereby terminating the insurance) (R. p. 81).

(8) Selected the beneficiary (employee) (R. pp. 67-69).

The Gulf Oil Corporation of Pennsylvania paid the insurer the required premiums at Pittsburgh, Pennsylvania, and reimbursed itself by the pay roll deductions from employees (R. p. 130).

DECISION OF THE COURT

"How, then, can it be said that what the dealer does in Wisconsin are mere collateral acts, where they operate to bring the insurance into effect for the first time—give it life—and only by these acts are those essentials of in-

DECISION OF THE COURT

"Whether we look at the case before us in its general aspect or at the special circumstances under which Boseman became insured, we are of the opinion that the transaction of insurance occurred in Pennsylvania and

surance, identity of insured, identity of property, term of the risk, payment of the premium, consummated?

"It is evident that it is deemed of some importance that the retail purchaser receive the certificate as his visible evidence of indemnity, and the course of business adopted indicates that the delivery of the same to him is made in Wisconsin through the Postal Service as the agent of the insurer.

"The business done and to be done in Wisconsin under the plan in question, in our opinion, constitutes a transaction of business within the State."

not in Texas. If employees in Texas desire to join in an insurance plan about to be set up or already in operation in Pennsylvania, and either in person or through their employer take steps in Pennsylvania to do so, the laws of Texas do not control. Let it be remembered that this policy was applied for, the first premium was paid and the policy was delivered in Pennsylvania, and that ordinarily fixes the place where an insurance contract is considered to be made.

"Since the certificate is not the contract nor at all necessary to the existence of the insurance, the time and place of its delivery are unimportant to the present inquiry."

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket "No. 8077, Connecticut General Life Insurance Company, Appellant, v. John Boseman, Appellee," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of the Fifth Circuit Court of Appeals heretofore entered be reversed and the judgment of the United States District Court for the Eastern District of Texas be affirmed,

and such further relief administered as to this Court may seem proper.

Respectfully submitted,

JOHN BOSEMAN,

By _____
Counsel for Petitioner.

_____
Of Counsel

NOVEMBER 12, 1936.

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

JOHN BOSEMAN, *Petitioner*
(Appellee below)

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Respondent
(Appellant below)

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Court Below

Opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. pp. 235-244) is reported in Federal Reporter, 2nd Series, Vol. 84, page 701.

II.

Jurisdiction

(a) The date of the judgment to be reviewed is July 14, 1936 (R. p. 235); petition for rehearing of said judgment was overruled by order dated August 27, 1936.

(b) The ruling made below and relied upon as a basis of this Court's jurisdiction is the order (R. p. 245) reversing (and rendering) the judgment of the trial court (R. p. 47).

(c) The statutory provision under which such jurisdiction is invoked is Section 240 of the Judicial Code, as amended by Act of February 13, 1925 (Chapter 229, Section 43, Statutes at Large 938, U. S. C. Title 28, Section 347).

(d) The cases believed to sustain said jurisdiction are: *Forsyth v. City of Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095; *Lamborn v. National Bank of Commerce of Norfolk, Va.*, 276 U. S. 469, 48 S. Ct. 378, 72 L. Ed. 657; and *Bradford Electric Light Company, Inc., v. Clapper*, 284 U. S. 221, 52 S. Ct. 118, 76 L. Ed. 254.

III.

Statement of the Case

John Boseman sought recovery from the Connecticut General Life Insurance Company of the permanent and total disability benefits in the sum of Four Thousand ($4,000.00) Dollars under Group Policy G5039-R, issued by said company on April 1, 1932, to the employees of the Gulf Oil Corporation of Pennsylvania and/or subsidiary and/or affiliated companies. In addition to the principal amount of disability benefits plaintiff requested One Thousand ($1000.00) Dollars attorney's fees and twelve per cent penalty under the provisions of Article 4736 of the Revised Civil Statutes of Texas (said Article hereinafter set out in full in Appendix).

Prior to April 1, 1932, the Gulf Oil Corporation of Pennsylvania and the Gulf Refining Company of Texas cancelled two group policies of insurance then in force and under which Petitioner was insured, and on said date Contract G5039-R was issued and delivered by Respondent to the Gulf Oil Cor-

poration of Pennsylvania and the Gulf Refining Company of Texas (R. p. 108), insuring the employees of the Gulf Oil Corporation of Pennsylvania and/or its subsidiary and/or affiliated companies, including the Gulf Refining Company, conditioned upon the individual employees, desiring this insurance, making such election and complying with the terms of said contract (R. pp. 67-87). Petitioner was an employee of the Gulf Refining Company at Port Arthur, Texas, and elected to become insured under said master policy.

Policy G5039-R, among other things, contained the following provisions:

"Election of Insurance. An employee may elect insurance under this policy by completing any form of pay roll deduction order approved by the Employer.

"Employees Insured. Each employee electing the insurance before becoming eligible, will be insured automatically on the day he becomes eligible.

"The insurance on such employee shall be effective when he is accepted for insurance by the Company (R. pp. 73-74).

"Amount of Insurance. The amount of insurance on each insured employee is determined by (a) completed years of continuous service and (b) classification by amount of monthly salary as follows:

Completed Years of Continuous Service		Salary Class 1-B
7	or Amount of insurance	4,000"

(R. pp. 74-75.)

"Table of One Year Premiums per $1000 Insurance

"The charge for Permanent Total Disability represents 1% of each premium below age 60.

Attained Age of Insured Nearest Birthday	Premium Per $1000
41	8.18"

(R. pp. 79-80)

"Individual Certificate. The Company will issue to the Employer for each insured employee an individual certificate. This certificate will in no way void any of the terms and conditions outlined in the policy but will show the insurance protection to which the employee is entitled, and to whom payable" (R. p. 84).

"Contract. The policy and the application of the Employer, copy of which is attached to and made a part of this policy, *and the applications of the employees,* if any, shall constitute the entire contract between the parties."

The conditions precedent for an employee to become insured under this contract were as follows: (a) *release the Connecticut General Life Insurance Company from all claims and liability under policies G5039 and G5545* (R. p. 99); (b) *make application for insurance under Contract G5039-R* (R. p. 99); (c) *execute a pay roll deduction order to the employer for the purpose of collecting the individual employees' premiums on Policy G5039-R* (R. pp. 73 and 79); (d) *secure a certificate of insurance under said contract* (R. p. 84); (e) *pay the premiums* (R. p. 78) *(f) Accepted for insurance by company (R.*

No employee was insured under said policy unless he was eligible for such insurance, elected to become insured and complied with the conditions precedent, as above set out (R. pp. 67-87).

On March 7, 1932, John Boseman was eligible for insurance under Master Policy G5039-R and elected to become insured under such contract, and on that date did comply with the requirements of the contract and conditions precedent, and was delivered a certificate insuring him against permanent total disability and death in the amount of Four Thousand ($4,000.00) Dollars, and each month thereafter he paid his premium on said policy and certificate (R. pp. 99 and 102).

Boseman's application, release and pay roll deduction order were made and executed at Port Arthur, Texas; his certificate of insurance was delivered to him in Port Arthur, Texas; and

his premiums were paid and collected at Port Arthur, Texas (R. p. 102).

During the year 1932, the Connecticut General Life Insurance Company had a permit, was authorized and qualified to write life, health and accident insurance in the State of Texas (R. p. 88).

The appellant, at the time this contract was entered into, intended to and did insure all the employees of the Gulf Refining Company at Port Arthur, Texas, who were eligible for and elected to become insured (R. p. 117).

The Connecticut General Life Insurance Company, at all times material hereto, recognized, authorized and honored any and all transactions that the Gulf Refining Company of Texas made and had between it and its employees with reference to issuance, delivery, cancellation, extension and reinstatement of employees' insurance under Master Policy G5039-R, *as agent for and in behalf of the Connecticut General Life Insurance Company* (R. p. 121).

All claims by employees or beneficiaries of employees of the Gulf Refining Company at Port Arthur, Texas, under the master policy and the certificate issued thereunder, were paid in Texas (R. p. 90).

The only provision in regard to the payment of premiums in the master policy is as follows: "At the end of the first and each subsequent policy year this policy may be renewed by the payment of premiums as herein provided;" in accordance with the rates as above set out (R. p. 77). The certificate issued to Boseman, however, advises how such premiums are to be paid and who shall pay them, to-wit: "If an employee through neglect or otherwise fails to pay his premium in advance, his insurance is automatically cancelled at the end of the period for which the premium is paid" (R. p. 55).

Under the undisputed facts and the above quoted provisions of the policy the trial court held that the final acts necessary

to consummate the policy and to make it become effective insofar as Boseman was concerned were performed in Texas and, therefore, the laws of that State govern said policy (R. p. 43). Under such findings, the court held that the sixty-day notice provision was void, as provided by Article 5546 of the REVISED CIVIL STATUTES of Texas (R. p. 43), and entered judgment accordingly in favor of Petitioner (R. p. 47).

Appeal was duly perfected to the Fifth Circuit Court of Appeals, which reversed the judgment of the trial court, holding that the contract should be interpreted under the laws of the Commonwealth of Pennsylvania (R. p. 235). It was conceded on appeal that the verdict of the jury to the effect that Boseman was permanently and totally disabled within the terms of the contract was a proper and correct verdict.

IV.

Specification of Errors

(a) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in its finding that Contract G5039-R should be governed by the laws of Pennsylvania and not by the laws of Texas (R. p. 247).

(b) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the certificate of insurance issued to appellee under the master policy constituted no part of the contract between Connecticut General Life Insurance Company and the appellee Boseman (R. p. 247).

(c) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the undisputed evidence showed as a matter of law that the entire contract was applied for, issued and consummated in the State of Pennsylvania (R. p. 247).

(d) The Honorable United States Circuit Court of Ap-

peals for the Fifth Circuit erred in holding under the undisputed evidence that the policy of insurance sued on was not governed by Article 5054 of the REVISED CIVIL STATUTES of the State of Texas (see Appendix) (R. p. 247).

(e) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the Gulf Refining Company, under the undisputed evidence, was not acting as an agent for and in behalf of the Connecticut General Life Insurance Company in the issuing of the policy sued on and for the collection of premiums on said policy as defined in Article 5056 of the REVISED CIVIL STATUTES of the State of Texas (see Appendix) R. p. 248).

(f) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the contract sued on was one made between the employer and the insurance company for the benefit of the employee, requiring the employee to accept the contract as made, as the undisputed evidence shows such contract to be a tripartite contract with the employee named as the insured (R. p. 249).

(g) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in holding that this policy was applied for, the first premium paid and the policy delivered in Pennsylvania, and that same fixes the place where the insurance contract is made (R. p. 250).

(h) The Honorable United States Circuit Court of Appeals for the Fifth Circuit erred in holding that no transactions with reference to the issuance and consummation of the policy of insurance were had in Texas (R. p. 250).

V.

Argument

The undisputed evidence in this case reflects that the claimant herein, John Boseman, in 1918, made application for and

received what was known as a noncontributory group life policy, issued by the Connecticut General Life Insurance Company of Hartford, Connecticut, to the employees of the Gulf Oil Corporation of Pennsylvania and subsidiary companies, of which companies the Gulf Refining Company was one whose employees were entitled to the benefits of such policy. The premiums of this policy were paid entirely by the Gulf Oil Corporation of Pennsylvania and the amount of the policy increased yearly until it reached the maximum amount of Two Thousand Five Hundred ($2,500.00) Dollars. In 1925 the claimant, John Boseman, made application for and was issued a contributory group life policy by the Connecticut General Life Insurance Company of Hartford, Connecticut, in the amount of One Thousand Five Hundred ($1,500.00) Dollars, upon which policy of insurance the said John Boseman paid part of the premiums; this policy was designated as Policy No. G-5545. These two policies remained in full force and effect until on or about April 1, 1932, at which time such policies were cancelled by John Boseman, the Gulf Refining Company and the Gulf Oil Corporation of Pennsylvania (R. pp. 147-148).

The Honorable Circuit Court of Appeals, in reversing the finding of the District Court that the policy should be construed under the Texas laws, and determining that the laws of Pennsylvania should apply, predicated such holding upon five propositions, each of which we will discuss separately.

The court's first finding (R. p. 240) that "the certificate was not necessary to existence of the insurance," is not supported by the provisions of the policy nor by the authorities construing the same policy or similar contracts.

The Texas courts have held that the certicate is a necessary part of the contract of insurance in the cases of CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. MOORE, 75 S. W. (2d) 329 (opinion by the Ninth Court of Civil Appeals, ap-

proved by Supreme Court of Texas); CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. DENT, 84 S. W. (2d) 250; CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. LOCKWOOD, 84 S. W. (2d) 245; METROPOLITAN LIFE INSURANCE COMPANY v. WORTON, 70 S. W. (2d) 216 (decision by Fort Worth Court of Civil Appeals, approved by the Supreme Court of Texas); METROPOLITAN LIFE INSURANCE COMPANY v. WANN, 81 S. W. (2d) 298.

The same conclusions were reached in CHRYSLER SALES CORPORATION v. SMITH, 9 Fed. (2d) 666 (decision by Federal three-judge statutory court and affirmed by the Supreme Court of the United States); CARRUTH v. AETNA LIFE INSURANCE COMPANY, 122 S. W. 226 (by the Supreme Court of Georgia).

In the MOORE case, supra, the court held:

"Certificate of insurance issued to appellee under this master policy was a part of the original contract. Appellee was not insured under this policy and certificate until he agreed to its conditions."

In the DENT and LOCKWOOD cases, supra, in which this identical master policy was construed, the court had this to say:

"Policy G5039-R insofar as it covered appellee was a Texas contract. Connecticut General Life Insurance Co. v. Moore, supra, in construing Policy G-5545."

In the WORTON case, supra, construing a similar policy and plan of insurance:

"The group policy referred to in this case did not of itself insure the plaintiff or any other employees of the Standard Oil Company or any of its subsidiaries. It was a contract that it would insure such employees upon application made therefor by their employer. Prior to the date plaintiff in the case re-

ceived his certificate of insurance, sued on, he was not a beneficiary under the group policy.

"The certificate of insurance issued plaintiff embodied a separate and additional contract with the plaintiff only and was delivered to him in Texas where he was employed and where the premiums were collected by the insurance company while it was doing business in the State of Texas under a permit granted by the State and was governed by the laws of Texas."

On this proposition JUDGE LUSE, in CHRYSLER SALES CORPORATION v. SMITH, supra, spoke thus:

"It may be borne in mind that by the Michigan contract it is provided that 'insurer shall issue certificates to purchasers substantially in the form attached,' while the course of business is to mail such certificate to the retail dealer. It is evident that it is deemed of some importance that the retail purchaser receive the certificate as his visible evidence of indemnity, and the course of business adopted indicates that the delivery of same to him is made in Wisconsin."

The undisputed facts upon this proposition are that Boseman's certificate was delivered to him in Port Arthur, Jefferson County, Texas, by the Gulf Refining Company, who also collected the individual premiums upon such policy at said place (R. pp. 90-91).

The Circuit Court of Appeals' second holding (R. p. 240) that "the insurer did not authorize the employer or its agent to solicit Boseman in Texas to become insured," is not supported by the contract, the undisputed evidence and the authorities.

The master policy provides:

"An employee may elect insurance under this policy by completing a form of pay-roll deduction order approved by the employer" (R. p. 73).

The certificate provides:

"If employee, through neglect or otherwise, fails to pay his

premium in advance his insurance is automatically cancelled at the end of the period for which the premium is paid.

"An employee absent from work for any cause must immediately notify his superior in writing, giving reason for his absence, otherwise he will be considered as having left the employment and his insurance will be cancelled" (R. p. 55).

The undisputed facts upon this proposition were that the insurance company, acting through the Gulf Refining Company in Texas, before insuring Boseman required him to execute a release of all claims and liabilities under Policies G-5039 and G-5545, make application in writing for insurance under Policy G5039-R, execute a pay roll deduction order in a form approved by the employer for the purpose of paying his premiums and to pay his individual premiums (R pp. 90-91 and 98-101). Under the provisions of the policy and certificate and undisputed facts, the courts of Texas in CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. MOORE, supra, CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. DENT, supra, CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. LOCKWOOD, supra, held:

"The final acts necessary to make the policy effective were performed in the City of Port Arthur, Jefferson County, Texas. Therefore, the master policy together with the certificate of insurance must be construed as a Texas contract."

The same holding was made in METROPOLITAN LIFE INSURANCE COMPANY v. WORTON, supra, and METROPOLITAN LIFE INSURANCE COMPANY v. WANN, supra.

In CHRYSLER SALES CORPORATION v. SMITH, supra, which was affirmed by the Supreme Court of the United States, it was said:

"The dealer in Wisconsin clearly does these things: (1) He sells the car, including the insurance. (2) He collects the price, including the premium. (3) He fixes the term of the insur-

ance. (4) He selects the beneficiary (purchaser). (5) He notifies the insurance company of these details. All these things are essential to the completion of the insurance contract, and bring it into actual existence, and occur in Wisconsin, between residents of that State; the dealer acting with authority under the Michigan contract.

"When in addition it is considered that in effect the Chrysler dealer acts as solicitor of insurance as an incident to the sale of automobiles we have no doubt that the insurance received by each purchaser in Wisconsin is in fact consummated in that State."

The Circuit Court of Appeals' third holding (R. pp. 241-242) that "several of the cases cited strongly assert that the employer is not to be regarded as the agent of the insurer soliciting insurance in the employee's State, but as a representative of the employees in making and retaining the insurance. We are persuaded that this is a true view, although a different conclusion was maintained by a Texas Court of Appeals in CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. LOCKWOOD, supra, and CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. DENT, supra. There may arise cases in which group insurance is made a cover by an insurance company for soliciting business in a State in which it is not qualified to do business, but this is not such a case," is without support in the record and wholly ignores Article 5056 of the REVISED CIVIL STATUTES of the State of Texas, and the authorities applying such statute to the contract here involved.

The record reflects that at all times material the Respondent recognized, authorized and honored any and all transactions that the Gulf Refining Company of Texas made and had between it and its employees with reference to issuance, delivery and cancellation of employees' insurance under Policy G5039-R as agent for and in behalf of the Connecticut General Life Insurance Company (R. p. 121), and that at all

times material Respondent had a permit and was authorized and qualified to write life, health and accident insurance in the State of Texas (R. p. 88), and that the Gulf Refining Company in Texas performed certain acts which constituted it an agent as a matter of law under Article 5056 of the REVISED CIVIL STATUTES of Texas, to-wit: Acting for the insurance company in securing a release of claims under former policies (R. p. 99), and applications for insurance under this policy (R. p. 99), thereby soliciting insurance in Texas. It secured a pay roll deduction order for the purpose of collecting the individual employee's premiums (R. p. 73), and collected such premiums and transmitted them to the insurance company through its Pittsburgh office (R. p. 78) and delivered a certificate of insurance to Petitioner in Texas (R. p. 84).

The Circuit Court of Appeals recognized that the Texas courts in construing these acts and applying them to this policy had held that the Gulf Refining Company was acting as an agent for the insurer, but it failed to recognize that the basis for this holding by the Texas courts was Article 5056 of the REVISED CIVIL STATUTES of Texas, which article we set out in full in the Appendix. The Texas courts are uniform in holding that any person "who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State, or who takes an application other than for himself, any application for insurance or policy for insurance, to or from any company, or transmits same, or who shall receive or deliver a policy of insurance for any such company, or who shall collect or transmit any premiums of insurance or do or perform any other act or thing in making or consummating any contract of insurance for or with such insurance company, other than for himself, whether done with or without the instance or request of the insurance company, are agents for said company." CONNECTICUT GENERAL

LIFE INSURANCE COMPANY v. MOORE, supra; CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. DENT, supra; CONNECTICUT GENERAL LIFE INSURANCE COMPANY v. LOCKWOOD, supra; SOUTHERN INSURANCE COMPANY OF NEW ORLEANS v. WOLVERTON HARDWARE COMPANY, 19 S. W. 615; CAMDEN FIRE INSURANCE COMPANY v. WANDELL, 195 S. W. 289.

The Circuit Court of Appeals' fourth holding (R. p. 242) that "if employees in Texas desire to join in an insurance plan about to be set up or already in operation in Pennsylvania and either in person or through their employer take steps in Pennsylvania to do so, the laws of Texas do not control," is not in accord with the great weight of authorities upon this proposition and is without support in the record and wholly ignores Articles 5054 and 5056 of the REVISED CIVIL STATUTES of Texas.

We heretofore have shown that the Texas courts in construing this and similar plans of insurance are in accord that the acts consummating this insurance were performed in Texas and were governed by Article 5056 of the REVISED CIVIL STATUTES of Texas.

In METROPOLITAN LIFE INSURANCE COMPANY v. WORTON, supra, which opinion was approved by the Supreme Court of Texas, it was stated that under Article 5054 of the REVISED CIVIL STATUTES of Texas any contract of insurance payable to a citizen or inhabitant of Texas issued by an insurance company doing business in this State shall be held to be a Texas contract, and we will demonstrate a little later that in addition to having an agent in Texas the Respondent was duly qualified and permitted to write insurance within this State. This, taken together with the fact that both the master policy and certificate were made payable to Boseman, rendered it a Texas contract.

The Supreme Court of the United States, in PALMETTO

FIRE INSURANCE COMPANY v. CONN, 71 L. Ed. 243, in affirming CHRYSLER SALES CORPORATION v. SMITH, supra, MR. JUSTICE HOLMES, in passing upon the question as to whether the acts performed in Ohio rendered the contract involved an Ohio contract, spoke thus:

"It will be held in some jurisdictions that the purchaser became a party to the contract with the insurance company. By universal consent he at least would become the beneficiary of a contract for his benefit. Whatever technical form may be given to the reasoning the substance is that by the acts done in Ohio the purchaser obtains for himself the advantage of insurance that before that moment did not exist."

The fifth holding of the Circuit Court of Appeals (R. p. 236) that "the insurance company during the time here involved had a permit to do business in Texas, but had never qualified by making the required deposits, had no office or agent in Texas and had written no insurance there of any kind since 1917," is contrary to the record in this case and is predicated upon an erroneous interpretation of Article 5056 of the REVISED CIVIL STATUTES of Texas.

Regarding the question of agency we have shown that at all times material hereto the Gulf Refining Company was acting as an agent of the insurer in the light of Article 5056 of the REVISED CIVIL STATUTES of Texas and the authorities construing such article. With reference to the authority of the Connecticut General Life Insurance Company to transact business in this State the certificate of the Insurance Commissioner of the State of Texas, found on page 88 of the Record, shows:

"The Connecticut General Life Insurance Company of Hartford, Connecticut, has, according to sworn statement, complied with all requirements of law applicable thereto and is here authorized to pursue the business of life, health and accident insurance within this State for the year ending February 28, 1933."

Prudential Life Insurance Company of America v. Terry, 95 S. W. (2d) 1109 (Kentucky Court of Appeals); Metropolitan Life Insurance Company v. Green, 95 S. W. (2d) 1241 (Texas Court of Civil Appeals); Metropolitan Life Insurance Company v. Pribble, 82 S. W. (2d) 414 (Texas Court of Civil Appeals).

The proposition advanced by the respondent in its argument and brief that the contract involved is one to insure in the future and not insurance in praesenti is in accord with the principle announced in Chrysler Sales Corporation v. Smith, 9 Fed. (2d) 666.

Respondent's argument that if the rule of conflict of laws is applied in this case the contract would be subjected to the construction of the laws of the Forty-eight States of the Union, should not deprive petitioner of his rights. The manner in which the contract was made, respondent being chargeable with notice of the provisions of Article 5056 of the Revised Civil Statutes of Texas, and having by its acts subjected itself to the provisions of that Statute, thereby submitted the contract to the construction placed thereon by the Texas Courts, it being the duty of this Court not to judicially regulate insurance business or fix rules by which insurance contracts are to be made but apply the law applicable to this particular contract.

We submit that the Master Policy in itself did not insure Boseman, and that his insurance was not effectuated until certain acts transpired (Record, p. 99, 73, 78, 79, and 84). Irrespective of any contentions made, respondent intended to insure Boseman in Texas (Record, p. 117), collect his premiums in Texas (Records, p. 82, 55, 99), deliver his certificate in Texas (Record, p. 101) and pay his claim in that State (Record, p. 90). The company was in fact performing every essential in carrying on an insurance business in Texas, with the employer acting as agent for and in behalf of the company in the transaction of this business (Record, p. 95, 121).

The fact that the insurance company may never have paid taxes in the State or made the required deposit is of no consequence. It should not be permitted to take advantage of its own dereliction in this respect. That would be a matter between the state department and the insurance company and not between the insurance company and the insured.

This being a tripartite contract between Connecticut General Life Insurance Company, the Gulf Oil Corporation of Pennsylvania and Petitioner Boseman, wherein the employer was only the medium through which the insurance was written and could derive no benefits from it, but all the benefits, if any, derived from the insurance were by the employee, how then can it be said that the entire contract of insurance was applied for, issued and consummated in Pennsylvania and that the acts of the employer in Texas were mere collateral acts, when they operate to bring the insurance into effect for the first time—give it life—and only by these acts were those essentials of insurance, identity of insured, terms of the risk, and payment of the premiums consummated, in view of the fact that this contract was not insurance in praesenti, but one to insure in the future, requiring that certain conditions precedent be performed in Texas before Petitioner's insurance became effective?

In further support of our contention that the Honorable Circuit Court of Appeals for the Fifth Circuit was incorrect in holding that the contract should be interpreted under the laws of Pennsylvania, we respectfully direct the court's attention to MUTUAL LIFE INSURANCE COMPANY v. JOHNSON, 55 S. Ct. 154; POOL v. PERKINS, 101 S. E. 240; LUMBERMEN'S INSURANCE COMPANY v. MEYER, 197 U. S. 407, 25 S. Ct. 483, 49 L. Ed. 810; ILLINOIS BANKERS LIFE ASSOCIATION v. TALLEY, 68 Fed. (2d) 4; METROPOLITAN LIFE INSURANCE COMPANY v. BROWNELL, 68 Fed. (2d) 481.

To hold that the contract here involved is not a Texas con-

tract is in conflict with the holding of the three-judge statutory court in CHRYSLER SALES CORPORATION v. SMITH, supra, and destroys the great weight of authority upon this proposition, including the Texas courts' interpretation of Articles 5054 and 5056 of the REVISED CIVIL STATUTES of Texas, and imposes an interpretation of such statutes far beyond the contemplation of the courts.

Conclusion

It is, therefore, respectfully submitted that this case is one which justifies the exercise by the Court of its supervisory power in the granting of a writ of certiorari and review, and reversal of the decision of the court below, and affirm the judgment of the trial court.

Printed and filed herewith is a duly certified transcript of the entire record as same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

Counsel for Petitioner.

Of Counsel

Appendix

Article 4736 of the REVISED CIVIL STATUTES OF TEXAS:

"In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss."

Article 5054 of the REVISED CIVIL STATUTES OF TEXAS:

"Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed, and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

Article 5056 of the REVISED CIVIL STATUTES OF TEXAS:

"Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than

for himself, or who shall examine into, or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of, or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter * * * "

Article 5546 of the REVISED CIVIL STATUTES OF TEXAS:

"No stipulation in a contract requiring notice to be given of a claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable. Any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void * * * "